

Feedback to Draft Copyright Rules, 2012

Centre for Internet and Society | 2012-09-29

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*The Centre for Internet & Society submitted its written comments on
the Draft Copyright Rules, 2012 to Mr. G.R.*

G.R. Raghavender Registrar of Copyrights & Director (BP&CR) Copyright Office Department of Higher Education Ministry of Human Resource Development 4th floor, Jeevan Deep Building, Parliament Street New Delhi — 110001

Dear Sir,

This submission contains comments from the Centre for Internet and Society on the Draft Copyright Rules, 2012. I apologize for the slight delay in submitting these.

Yours sincerely, Pranesh Prakash Policy Director Centre for Internet and Society

Relinquishment of Copyright

Analysis

The law in India allows anonymously and pseudonymously created works to be copyrighted as well, as is clear from section 23 of the Copyright Act. However, rule 8 as it currently is does not allow such authors to relinquish copyright. Relinquishment of copyright is a very different kind of act from registration of copyright, and hence it is not necessary to seek the same categories of information from both. Certain categories of information sought during registration of copyright ("class of work", "language of the work", "nationality of author") are required not because they help identify a work, but because they help in indexing the work ("class of work", "language of work") or in ensuring that the work is copyrightable in India ("nationality of author"). Such considerations do not matter when it comes to relinquishment of copyright, i.e., when a work is allowed to pass into the public domain. Further, technological progress has made it difficult to determine the answer to a question like "country of first publication", "nationality of the publisher", etc. If a work has been uploaded by an author on to his blog, is the publisher the author or the person hosting the blog? If an Indian author residing in India first publishes a work on the server located in Argentina, is the country of first publication India or Argentina? The answer to these questions does not make a difference to the issue of relinquish-

ment of copyright. The only information that is required for relinquishment of rights is a) what work is being put in the public domain, b) by whom, c) from when.

Furthermore, the current requirements of rule 8 cannot easily be satisfied by using most of the popular means of relinquishing copyright (such as the CC0 — Creative Commons Zero — licence).

Recommendations

Rule 8 be modified to read: A public notice issued by an author relinquishing his or her rights as per subsection (1) of section 21 of the Copyright Act, shall include the following details: (a) Title of the work (b) Full name, or pseudonym, in case the work has not been created anonymously (c) Date of issuance of the notice (d) If copyright in the work is registered under section 45, the registration number.

Rule 9 be modified to read: Any one of the following shall constitute public notice of relinquishment of copyright: i. Mentioning of the notice on the work, or cover of the work, or in the metadata of the work if the work is electronic; or ii. Publication in a newspaper; or iii. Publication by the author on a publicly-accessible website

Rule 10 be modified to add the following sentence: The author shall forward a copy of the public notice to the Registrar of Copyright if copyright in the work has been registered under section 45 and on receiving such notice, the Registrar of Copyright shall post the same on the website of the Copyright Office.

Statutory Licence for Cover Versions

Analysis

Rule 34(2) is redundant and does not contain any detail not already present in the existing proviso to section 31C(1) of the Copyright Act. Additionally, Rule 35 also does not contain any detail not already present in the existing parent provision, section 31C of the Copyright Act.

Recommendations

Rules 34(2) and 35 be deleted. Rule 37 should be modified to add a sub-rule requiring maintenance of records online.

Indexes

Analysis

In rule 71(3), it requires that the indexes be maintained in the form of cards. These are presumably physical cards. It is unclear why the rule should not require the maintenance of these indexes online to facilitate search by the public. Further entries 13 and 14 of Schedule II are from a time when the transaction

costs incurred by the Registrar of Copyright for providing extracts from an Index were non-negligible, and hence it would have been necessary to charge a person for such services. With the capabilities of electronic systems, such retrievals are almost costless, and can be done without the intervention of the Registrar of Copyright. Hence entries 13 and 14 should not be made applicable to online retrievals. If copyright societies can be required to provide information free of costs on their websites (as per rule 65), the Registrar of Copyright should be required to do so too.

Recommendation

Modify sub-rule (3) of rule 71 to read: "Every Index shall be available online as a downloadable database, with an online search facility."

Modify the second sentence in rule 72 to read: "The online search or inspection of the Register of Copyrights and Indexes can be utilised free of cost."

Storage of Transient or Incidental Copies of a Work

Analysis

It is not clear enough from the language of rule 74 that it applies only to s.52(1)(c) and not to s.52(1)(b). Since only s.52(1)(c) has a complaints mechanism, this should be made clear.

Importantly, to protect the interest of the public, the intermediaries should be asked to give public notice regarding the alleged infringing copy to ensure that the take-down mechanism is not abused, and secondly to ensure that the public can independently verify that intermediaries are following the requirement in rule 74(4) of restoring storage of the work if no court order is forthcoming within 21 days.

Lastly, there is no clear precedent in India to treat a uniform resource identifier (URI) as 'place' for purposes of section 51(a)(ii) of the Copyright Act, 1957. Therefore it is necessary to further clarify the meaning of the term 'place' as used in current Rule 74(2)(d). This would be best served by using the correct technological term ("URI") instead of the word "place".

Recommendation

Modify sub-rule (1) of rule 74 to: "Any owner of copyright may give a written complaint as per clause (c) of subsection (1) of section 52 of the Copyright Act to a person who has facilitated..."

Add sub-rule (6) to rule 74: "The person responsible for storage shall put up a public notice thereby notifying all persons requesting access to the alleged infringing copy by stating reasons for restraining such access whether during the period of 21 days from the complaint from the copyright owner, or pursuant to an order from a competent court."

Modify rule 74(2) to read: "Details of the specific uniform resource identifier (URI) where transient or incidental storage of the work may be taking place."

Making or Adapting the Work by Organizations Working for the Benefit of Persons with Disabilities

Analysis

Rule 75 requires organizations making use of the exception granted under s.52(1)(zb) to maintain records. This could not have been the intention of the legislature in passing s.52(1)(zb), since that provision does not require any maintenance of records. Indeed, none of the exceptions enumerated in s.52(1) require the maintenance of records. This is in contrast with s.31B, which is also applicable to organizations working for the benefit of persons with disabilities, but only those that are doing so as a for-profit venture. Rule 29(6) already requires the Registrar of Copyright to notify the grant of a licence under s.31B in the Official Gazette. That provision may be modified to add that the Registrar of Copyright maintains these records in a centralized database that can be queried online.

Recommendations

Delete rule 75, and modify rule 29(6) to include a centralized database.

Technological Protection Measures

Analysis

Most experts seem to hold that s.65A of the Indian Copyright Act does not affect circumvention tools, as it only deals with the act of unauthorized circumvention and not with the tools, in sharp contrast with s.1201(a)(2) of the Digital Millennium Copyright Act in the US, which criminalises the "manufacture, import, offer to the public, provision, or otherwise trafficking in any [circumvention] technology, product, service, device, component, or part thereof". The Indian law has consciously chosen not to emulate the DMCA in this respect, as the WIPO Copyright Treaty does not require it.

The broad understanding of "facilitation" contained in the Copyright Rules unfortunately seem to undermine this clear distinction. If facilitation is understood to include offer to the public, provision, or distribution, as seems to be the case in Rule 79(3) and 79(4), then law becomes unworkable with each and every website that allows for the downloading of any software that can be used to play DVDs, etc., must specifically keep a register of downloaders from India. This is unnecessary, and goes beyond the intent of s.65A, which is to cover those who actively facilitate circumvention and not those who make available the tools to circumvent. This distinction should not be blurred.

Recommendation

Delete sub-rules (3) and (4) of rule 79.